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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOAN GLATT et al., Plaintiffs and Respondents, v. SHELDON S. ELLIS, Defendant and Appellant.	B171554 (Los Angeles County Super. Ct. No. BC260312)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frances Rothschild, Judge. Affirmed.

Sheldon S. Ellis, in pro. per., for Defendant and Appellant.

Wasserman, Comden, Casselman & Pearson, Mark S. Gottlieb, Leonard J. Comden and Martin S. Rudoy for Plaintiffs and Respondents.

This case involves the disposition of an eight-unit apartment building located at 1937 Pelham Avenue in Los Angeles. The apartment building was owned by Harry Weiner and Hilda Weiss as tenants in common.[1] Harry predeceased Hilda. In his will, Harry devised his share of the apartment building to his four children, subject to Hilda's use and control of the property during her lifetime or until a sale of the property. After Hilda's death, plaintiffs Joan Glatt, Parker Weiner, Bruce Americus, Robert Americus, Agnes Americus, The Paul and Agnes Americus Joint Revocable Trust, and Cathy Sue Breig filed the instant action against defendant Sheldon Ellis alleging several causes of action, including quiet title, accounting, and partition. Following a bench trial, the trial court entered judgment in favor of plaintiffs. Defendant appealed from the judgment.

Defendant's contentions on appeal are as follows: (1) "In a quiet title action, compliance by plaintiffs with statutory requirements to bring all interested parties before the court is mandatory"; and (2) "The words and phrases in the Probate [Code] cannot lawfully be construed in any manner other than according to their ordinary and grammatical meaning; unless the intention to use them in another sense is clear and their intended meaning can be ascertained." We affirm.

FACTS AND PROCEDURAL BACKGROUND

Harry and Hilda owned the eight-unit apartment building as tenants in common. Harry had four children from a prior relationship: Glatt, Parker, Doris Weiner, and Helen Americus. Defendant is Hilda's son from a prior relationship. In 1972, Harry told Glatt that he was upset with Hilda and wanted to change his will so that his interest in the apartment building would go to his children. However, Harry said that Hilda would be allowed to live in the property until her death or until she sold the property. Harry died in

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[1] Hilda was also known as Hilda Weiner. Several parties and family members mentioned in the facts share the same last name. Therefore, for clarity, they will be referred to individually by their first names.

1973. Harry's will left his real property to his four children, subject to Hilda's right to use the property during her lifetime or until the property was sold. The will provisions limited Hilda's ability to encumber the property.

Harry's four children were living at the time of his death. However, Glatt and Parker are his only currently living children. Doris died intestate in 1979, having never married and with no children. Helen was married at the time of her death in 1981, and her husband inherited her interest in the property. Helen's husband died in 1985, and his property passed by will to his brothers Norman Americus and Paul Americus. Norman died intestate in 1998. Norman's property was divided among his three children, Bruce, Robert, and Breig. Paul and his wife Agnes had established a revocable trust. Paul died in 2000, and his interest in the property was transferred to the trust.

Hilda died in 1999, but defendant did not notify plaintiffs of his mother's death. Defendant treated the property as his own and made no payments to plaintiffs. Parker and Glatt discovered Hilda's death in 2001.

Plaintiffs filed the instant action against defendant alleging 11 causes of action. Their essential contention was that as Harry's children or their heirs, they took title to a one-half interest in the apartment building upon Hilda's death. The causes of action were bifurcated for trial. During the first phase, defendant presented no evidence as to Harry's testamentary intent. The trial court ruled that Harry's will was not ambiguous. The trial court found that upon either Hilda's death or the sale of the property, Harry's heirs would be entitled to their one-half interest. The trial court further ruled that even if the will were ambiguous, plaintiffs were entitled to relief. The trial court found that the will provision limiting Hilda's ability to encumber the property supported the interpretation that title passed to Harry's heirs upon Hilda's death. In addition, the trial court noted that Harry's heirs were the natural object of his donative intent, and Glatt's conversation with her father was consistent with that donative intent.

During the partition phase of the trial, defendant argued that plaintiffs were required to bring all persons interested in the property before the court in a quiet title action. Defendant's position was that it was mandatory that the personal representatives

of Harry's deceased children Doris and Helen be joined as defendants, and the failure to do so was fatal to plaintiffs' case. The trial court rejected defendant's argument that the proper parties were not before the court.

Defendant testified that Hilda transferred her interest in the apartment building to him by quitclaim deed in 1998. He did not notify plaintiffs when he took title. Defendant believed that because no sale of the property had taken place, he also owned the one-half interest that Harry granted Hilda in his will.

The trial court found in favor of plaintiffs on the causes of action for accounting, quiet title, and partition. The trial court found that: plaintiffs took title in fee simple when Hilda died in 1999; defendant owned a 50 percent interest in the property; and the other 50 percent interest in the property was divided in varying percentages among plaintiffs. Based on an accounting from the date of Hilda's death, the trial court awarded plaintiffs total damages of $258,788.89. The trial court ordered that the property be sold and the proceeds distributed in accordance with the trial court's calculations of the parties' interests. The trial court appointed a receiver to facilitate the sale of the property.

DISCUSSION

Alleged Failure to Join Indispensable Parties

Defendant argued before the trial court, and contends here on appeal, that plaintiffs failed to join indispensable parties to their quiet title action. Defendant reasons that Code of Civil Procedure section 762.010[2] requires that all persons having adverse claims to the title shall be named as defendants. Defendant further reasons that where a person required to be named as a defendant is dead, Code of Civil Procedure

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[2] Code of Civil Procedure section 762.010 provides as follows: "The plaintiff shall name as defendants in the action the persons having adverse claims to the title of the plaintiff against which a determination is sought."

section 762.030[3] mandates joinder of a personal representative of the decedent.[4] In the instant case, two of Harry's beneficiaries under his will—daughters Doris and Helen—were deceased, and their personal representatives were not named as defendants.

Defendant's reliance on Code of Civil Procedure section 762.010 is misplaced. Code of Civil Procedure section 762.010 requires joinder as defendants of persons having "adverse claims" to the title of the plaintiff. The Law Revision Commission Comment on the 1980 Addition to Code of Civil Procedure section 762.010 notes in part: "Section 762.010 states the rule for joinder of known adverse claimants. Failure to join these persons will result in a judgment that does not bind them." "Our courts have clearly indicated that a judgment obtained under [former Code of Civil Procedure] section 749 et seq. is not binding as to a person 'known' to plaintiff to have an adverse claim, if that person is not named and served." (*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 908.) In this case, the only known individual with a claim adverse to plaintiffs'

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[3] Code of Civil Procedure section 762.030 provides as follows: "(a) If a person required to be named as a defendant is dead and the plaintiff knows of a personal representative, the plaintiff shall join the personal representative as a defendant. [¶] (b) If a person required to be named as a defendant is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative: [¶] (1) The plaintiff shall state these facts in an affidavit filed with the complaint. [¶] (2) Where it is stated in the affidavit that such person is dead, the plaintiff may join as defendants 'the testate and intestate successors of _____ (naming the deceased person), deceased, and all persons claiming by, through, or under such decedent,' naming them in that manner. [¶] (3) Where it is stated in the affidavit that such person is believed to be dead, the plaintiff may join the person as a defendant, and may also join 'the testate and intestate successors of _____ (naming the person) believed to be deceased, and all person claiming by, through, or under such person,' naming them in that manner."

[4] The definition of "personal representative" is found in Probate Code section 58. Probate Code section 58 provides as follows: "(a) 'Personal representative' means executor, administrator, administrator with the will annexed, special administrator, successor personal representative, or a person who performs substantially the same function under the law of another jurisdiction governing the person's status. [¶] (b) 'General personal representative' excludes a special administrator unless the special administrator has the powers, duties, and obligations of a general personal representative under [Probate Code s]ection 8545."

interests in the property was defendant, who took the position he was entitled to complete control of the property after his mother's death until the point the property was sold. Plaintiffs, as heirs to a one-half interest in the property either as beneficiaries under Harry's will or as lawful heirs of deceased beneficiaries, were not adverse to each other in seeking a 50 percent ownership interest in the property.

Nor does Code of Civil Procedure section 762.030 provide support for defendant's contention. Both subdivisions (a) and (b) of Code of Civil Procedure section 762.030 apply only where "a person required to be named as a defendant is dead." Code of Civil Procedure section 762.030 must be read in light of Code of Civil Procedure section 762.010, since it is the latter section that defines who must be named as a defendant. As pointed out earlier, Code of Civil Procedure section 762.010 requires that persons having known adverse claims to the title sought by plaintiffs must be named as defendants. The heirs of the two deceased beneficiaries under Harry's will are not in any way adverse to the position set forth in the complaint. To the contrary, by joining in the complaint as plaintiffs, the heirs to the deceased beneficiaries conclusively demonstrated the absence of an adverse interest to anyone other than defendant.

In any event, the California Supreme Court has spoken on the issue of the duty on a plaintiff in a quiet title action to seek out persons with a known adverse interest in the property. "'We have no doubt that where the statute is thus careful to secure actual notice to known claimants, it should not be construed as intended to permit a plaintiff to willfully or negligently close his eyes to the means of knowledge and thus secure a decree by publication and posting alone, as against persons whose identity he might have learned by the use of due effort.' [Citation.] We hold that this standard of 'reasonable diligence' applies in connection with 'known' claimants in an action brought under [former Code of Civil Procedure] section 749 et seq." (*Gerhard v. Stephens*, *supra*, 68 Cal.2d at p. 908.) Plaintiffs in the instant case used "reasonable diligence" in that all heirs to Harry's one-half interest in the Pelham property joined the action as plaintiffs. There is no evidence in this record that any other known claimant had an adverse claim to the property.

Finally, defendant has not explained how his interests were prejudiced by the failure to join personal representatives of the two deceased heirs named in Harry's will. As discussed above, any failure to name a personal representative as a defendant would only mean that the judgment of the trial court was not binding on the indispensable party not before the court. (*Gerhard v. Stephens*, *supra*, 68 Cal.2d at p. 908.) There is nothing in Code of Civil Procedure section 762.010 which indicates that a quiet title action is not fully binding on a defendant who appears, is afforded a full hearing, and is unsuccessful in defending the action on the merits. Applying the rule that "[n]o judgment shall be set aside . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice" (Cal. Const., art. VI, § 13), we hold that any failure to join a personal representative of a deceased beneficiary under Harry's will as a defendant in this quiet title action did not result in a miscarriage of justice as to defendant Ellis.

Trial Court Properly Interpreted the Will and Probate Decree

Harry's will provided in part as follows: "I hereby declare that the real property located at 1937 Pelham Avenue, Los Angeles, California stands now of record in my name as to an undivided one-half interest and in my wife, HILDA WEINER, an undivided one-half interest. [¶] I hereby give, devise and bequeath my said undivided one-half interest in said real property to my children, HELEN AMERICUS, DORIS WEINER, PARKER WEINER and JOAN GLATT in equal shares or the survivors of them. [¶] This bequest, however, is subject to the right of my wife to use and control the entire said real property during her [lifetime] or until a sale of said property takes place. . . . [¶] Upon a sale taking place the escrow shall pay direct to each of my said children a one-fourth of one-half of the net proceeds. The other half of the net proceeds is to be paid to my wife, HILDA WEINER."

The final probate decree, signed April 30, 1976, provided that Harry's undivided one-half interest in the Pelham property was left to his four children, "subject to the right

of surviving spouse entire of said real property during her lifetime or until a sale of the property takes place."

Defendant takes the position that because neither the will nor the probate decree included the words "whichever first occurs," the Pelham property remained Hilda's property even after her death, since the property had not been sold. Defendant's position is that Hilda was not just granted a life estate, but instead she kept title to pass to her heirs as long as the property was not sold. The trial court ruled that the will was not ambiguous. Although the court was convinced the will was unambiguous, the trial court also ruled if it were deemed ambiguous, a later provision in the will prohibiting Hilda from encumbering the property supported the view that upon Hilda's death one-half the property would go to Harry's children. The trial court also observed that Harry's children were the natural object of his donative intent. Finally, the trial court noted that Glatt's testimony regarding Harry's intent was consistent with the trial court's interpretation of the will. We hold that the trial court properly interpreted the will.

"The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument." (Prob. Code, § 21102, subd. (a).) " 'The paramount rule in the construction of wills, to which all other rules must yield, is that a will is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect as far as possible." (*Estate of Wilson* (1920) 184 Cal. 63, 66-67.) . . .' " (*Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126, 134.) "When the language of a will is ambiguous or uncertain resort may be had to extrinsic evidence in order to ascertain the intention of the testator." (*Estate of Russell* (1968) 69 Cal.2d 200, 206.) Extrinsic evidence is admissible to explain an ambiguity arising from the face of the will, or to resolve a latent ambiguity. (*Ibid*.) "A latent ambiguity is one which is not apparent on the face of the will but is disclosed by some fact collateral to it." (*Id*. at p. 207.) An appellate court conducts an independent review of the interpretation of the language of a will in the absence of a conflict in the extrinsic evidence. (*Id*. at p. 213.)

The language in Harry's will, and the language in the decree of the probate court, is not ambiguous. On their face both documents provide that Hilda has a life estate in Harry's undivided one-half interest in the Pelham property, provided she does not sell the property. Upon her death, or the sale of the property, Harry's four children would take his undivided one-half interest. This is the only reasonable construction of the disposition of the Pelham property. Thus when Hilda died, the life estate ended, and title to one-half of the property passed to Harry's lawful heirs.

Defendant's interpretation of the devise of the property is unreasonable. Under defendant's reasoning, title to one-half of the Pelham property did not pass to Harry's four children even after Hilda's death, so long as the property was not sold. This strained interpretation cannot be reconciled with the intent expressed in the will. It is readily apparent that Harry granted Hilda the right to use his interest in the property only until her death or until such time as the property was sold.

Defendant presented no evidence of a latent ambiguity at trial, as permitted by *Estate of Russell, supra,* 69 Cal.2d 200. Defendant presented no evidence at all of Harry's intent, instead relying on his own strained interpretation of the will. On the other hand, plaintiffs introduced testimony from Harry's daughter, Glatt, that her father told her before his death that he was upset with Hilda. Harry told his daughter he wanted to break the joint tenancy with which he held the property with Hilda, and he went to an attorney for that purpose. Harry was changing the ownership so that half of the property would go to his four children. Glatt testified: "My father was quite explicit. He said that he would -- the children, the four living children, would inherit his half of the building but Hilda would be able to live in the property until her death or until she sold the property, one or the other. And at that time, and only at that time, would we be entitled to our share. As long as [Hilda] was alive and living in the property, or had not sold the property, Hilda would be able to collect all the rents." Given this testimony as to Harry's intent, we are satisfied that Hilda's interest in Harry's one-half of the property ended with her death.

Even if we were to find the language of the will and probate decree to be ambiguous, the end result would remain that title to Harry's undivided one-half interest in

the Pelham property passed to plaintiffs upon Hilda's death. Harry's donative intent, as expressed in the will, was to give his interest in the Pelham property to his children. It would defeat Harry's intent if defendant were allowed to control Harry's one-half interest in the Pelham property after Hilda's death. "The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative." (Prob. Code, § 21120.) Harry's intent as to his children was not the only intent he expressed in the will. Harry expressed a different intent as to defendant by leaving him only a "pair of solid gold cuff-links with blue sapphire stone therein." To allow defendant to control Harry's interest in the Pelham property, when he was only bequeathed a pair of cufflinks in the will, would clearly defeat Harry's expressed intent. The trial court properly ruled that if the will were ambiguous, the reasonable construction was that asserted by plaintiffs.

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded their costs on appeal.

NOT TO BE PUBLISHED.

KRIEGLER, J.*

We concur:

ARMSTRONG, Acting P. J. MOSK, J.

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* Judge of the Superior Court for the Los Angeles Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.